

Message Text

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ORIGIN EB-11

INFO OCT-01 ARA-16 ISO-00 AID-20 FMC-04 L-03 CIAE-00

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FM SECSTATE WASHDC

TO AMEMBASSY GUATEMALA IMMEDIATE

C O N F I D E N T I A L STATE 224986

E.O. 11652: N/A

TAGS:ETRN, GT, US

SUBJECT:FMC ASSERTS CLAIM AGAINST CCT AND FLOMERCA FOR
SECTION 15 VIOLATION

1. THE FEDERAL MARITIME COMMISSION (FMC) INFORMED HE
DEPARTMENT THAT ON NOVEMBER 13 LETTERS WERE SENT TO HILL,
BETTS & NASH, 1 WORLD TRADE CENTER, NYC AND TO KURRUS &
JACOBI, 2000 K STREET, N.W., WASHINGTON, ATTORNEYS FOR
FLOMERCA AND COORDINATED CARIBBEAN TRANSPORT (CCT),
RESPECTIVELY, INFORMING THE TWO LINES THROUGH THEIR LEGAL
COUNSEL THAT THE FMC IS ASSERTING A PENALTY CLAIM IN THE
AMOUNT OF \$64,000 AGAINST EACH CARRIER UNDER NEW PROCED-
URES ESTABLISHED BY PL 92-416 FOR THEIR HAVING IMPLEMENTED
A SHIPPING AGREEMENT IN THE FOREIGN COMMERCE OF THE US
(A ROYALTY AGREEMENT OF DECEMBER, 1971) WITHOUT PRIOR
FMC APPROVAL, A VIOLATION OF SECTION 15 OF THE SHIPPING
ACT, 1916. PL 92-416 OF AUGUST 29, 1972 AMENDED US SHIP-
PING LEGISLATION BY CONVERTING CRIMINAL PENALTIES PRO-
VIDED THEREIN TO CIVIL PENALTIES IN CERTAIN INSTANCES
(E.G. SECTION 15 VIOLATIONS) AND GIVES THE FMC THE DIS-
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CRETION WHETHER TO ASSERT A CLAIM AND NEGOTIATE A SETTLE-
MENT ITSELF OR TO REFER VIOLATION TO THE DEPARTMENT OF
JUSTICE (DOJ) FOR PROSECUTION. PREVIOUSLY, ALL SECTION 15
VIOLATIONS WERE HANDLED BY THE DOJ BECAUSE OF THEIR ANTI-

TRUST OR CRIMINAL IMPLICATIONS.

2. EXISTENCE OF THE DECEMBER, 1971 ROYALTY AGREEMENT BETWEEN CCT AND FLOMERCA WAS BROUGHT TO THE ATTENTION OF THE COMMISSION AS A RESULT OF GUATEMALA'S A-235 OF DECEMBER 17, 1972. PARA 2 OF STATE 37059 OF FEBRUARY 29, 1973 INFORMED THE EMBASSY THAT THE FMC HAD NO RECORD OF THE AGREEMENT AND THAT THE FAILURE OF THE PARTIES CONCERNED TO FILE IT WITH THE FMC FOR APPROVAL WAS CONSIDERED A POSSIBLE VIOLATION OF SECTION 15 WHICH THE COMMISSION INTENDED TO INVESTIGATE. THEREAFTER, ON MARCH 23, 1973, THE ATTORNEYS FOR THE LINES FILED THE AGREEMENT WITH THE COMMISSION. ASSIGNED FMC AGREEMENT NO. 10047, THE ACCORD WAS PUBLISHED IN THE FEDERAL REGISTER ON MAY 24, 1973 WITH A STIPULATION THAT ANY PROTESTS THERETO BE RECEIVED BY THE FMC WITHIN 30 DAYS. SEA-LAND, DELTA LINES AND PRUDENTIAL-GRACE LINES, ALL AMERICAN FLAG CARRIERS, PROTESTED AND AS A RESULT HEARINGS ON THE AGREEMENT WERE TO BE SCHEDULED. HOWEVER, ON AUGUST 6, 1973 BEFORE HEARINGS COULD BE HELD, THE LINES' ATTORNEYS WITHDREW THE AGREEMENT POSSIBLY BECAUSE OF THE PROTESTS AND IN RECOGNITION THAT APPROVAL OF THE AGREEMENT WAS UNLIKELY.

3. THERE IS NO DOUBT THAT THE LINES WERE AWARE THAT THEIR OPERATION UNDER AN UNAPPROVED ACCORD VIOLATED SECTION 15 AND SUBJECTED THEM TO POSSIBLE CIVIL ACTION AND PENALTIES SINCE THE MATTER HAD BEEN INFORMALLY DISCUSSED BY THE FMC AND THE LINES' LEGAL REPRESENTATIVES FOLLOWING THE FILING OF THE AGREEMENT LAST MARCH. WHAT HAS BEEN IN DOUBT HAS BEEN THE AMOUNT TO BE CLAIMED. ACCORDING TO THE FMC, IT DETERMINED THAT THE LINES WERE IN VIOLATION OF SECTION 15 FOR 342 DAYS DURING WHICH TIME 64 VOYAGES WERE MADE. THE AMOUNTS CLAIMED ARE BASED ON THE NUMBER OF VOYAGES MADE FROM THE DATE OF THE ENACTMENT OF PL 92-416 (\$1,000 FOR EACH ONE), BUT COULD HAVE CONCEIVABLY AMOUNTED TO A LARGER SUM HAD

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THE CALCULATIONS REFLECTED THE VOYAGES MADE SINCE DECEMBER, 1971 (THE DATE THE AGREEMENT WAS ENTERED INTO) OR AT THE MAXIMUM PENALTY RATE OF \$1,000 DAILY ALLOWABLE UNDER SECTION 15 FOR EACH DAY A CARRIER IS FOUND TO BE IN VIOLATION OF THE SECTION.

4. THE NEXT STEP WILL BE FOR THE FMC AND THE LINES' LEGAL COUNSELS TO NEGOTIATE AN ACCEPTABLE SETTLEMENT. THE LINES ARE NOT OBLIGATED TO NEGOTIATE OR SETTLE WITH THE FMC. HOWEVER, FAILURE TO DO SO WILL RESULT IN THE MATTER BEING REFERRED TO THE DOJ FOR PROSECUTION AND COULD INVOLVE A MUCH LARGER FINE. THEREAFTER, REFUSAL TO PAY ANY FINE SET BY THE COURT WOULD LEAVE THE DOJ

NO ALTERNATIVE BUT TO OBTAIN A COURT ORDER TO ATTACH PROPERTY OF THE LINES FOUND WITHIN THE JURISDICTION OF THE UNITED STATES (E.G. A VESSEL).

5. THE LETTERS SHOULD ARRIVE AT THE ATTORNEYS' OFFICES TODAY OR TOMORROW. THE DEPARTMENT IS CONCERNED THAT ONCE NOTIFIED OF THE CLAIM , FLOMERCA AND THE GOG MAY INTERPRET THE FMC DETERMINATION AS A USG EFFORT TO PRESSURE FLOMERCA ON THE CURRENT SHIPPING PROBLEM WITH DELTA LINES. THIS, IN TURN, PARTICULARLY AGAINST THE BACKGROUND OF SIMULTANEOUS EVENTS OF WHICH THE EMBASSY IS AWARE, COULD GIVE RISE TO AN EMOTIONAL RESPONSE. ACCORDINGLY, DRAWING ON THE FOREGOING, THE EMBASSY, AT ITS DISCRETION, MAY WISH TO DISCUSS THE FMC CLAIM WITH APPROPRIATE GOG AND FLOMERCA OFFICIALS IN AN EFFORT TO DISPEL ANY MISUNDERSTANDING ON THIS MATTER. IN ANY DISCUSSIONS YOU SHOULD STRESS THE POINT HAT THE FMC NOTIFICATION HAS NO CONNECTION WITH THE ISSUE PENDING BETWEEN DELTA AND FLOMERCA, BUT RATHER IS THE OUTCOME OF A PROCEDURE OF WHICH FLOMERCA HAS LONG BEEN AWARE. YOU MIGHT ALSO WISH TO INDICATE THIS IS A CLAIM, AND NOT A FINDING. YOU MAY POINT OUT THAT THE VIOLATION CAME TO THE ATTENTION OF THE FMC IN JANUARY, 1973 AND HAS BEEN UNDER ACTIVE CONSIDERATION SINCE THAT TIME. MOREOVER, WE ASSUME THAT BOTH CCT AND FLOMERCA WERE CONFIDENTIAL

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AWARE OF THIS BECAUSE OF THE INFORMAL FMC DISCUSSIONS THAT HAVE TAKEN PLACE WITH THEIR ATTORNEYS. YOU MAY ALSO STRESS THAT THE NEW PROCEDURES FOR HANDLING SECTION 15 VIOLATIONS ES ABLISHED BY PL 92-416 ARE MORE FLEXIBLE IN THAT THEY ENABLE THE FMC AND THE PARTIES FOUND TO BE IN VIOLATION OF THE SECTION TO NEGOTIATE AN OUT-OF-COURT SETTLEMENT. PREVIOUSLY, SECTION 15 VIOLATIONS WERE REFERRED DIRECTLY TO THE DOJ IN THE FIRST INSTANCE. IF NECESSARY, YOU SHOULD INDICATE THAT THIS IS NOT THE FIRST TIME FLOMERCA HAS BEEN FOUND IN VIOLATION OF SECTION 15. LEGAL PROCEEDINGS WERE BROUGHT AGAINST FLOMERCA AND JAN C. UITERWYK BY THE DOJ IN 1968 FOR OPERATING UNDER A SHIPPING AGREEMENT WHICH WAS NEVER SUBMITTED TO THE FMC FOR APPROVAL AND FOR CARRYING CARGO AT TARIFF RATES LOWER THAN THOSE ON FILE WITH THE FMC. THE TWO LINES WERE FINED \$5,000 EACH UNDER A CONSENT DECREE WORKED OUT BETWEEN DOT AND THE LINES' REPRESENTATIVES.

6. PLEASE ADVISE US OF ANY REACTION BY GOG OR FLOMERCA.
RUSH

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Disposition Approved on Date:
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Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
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Enclosure: DG ALTERED
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